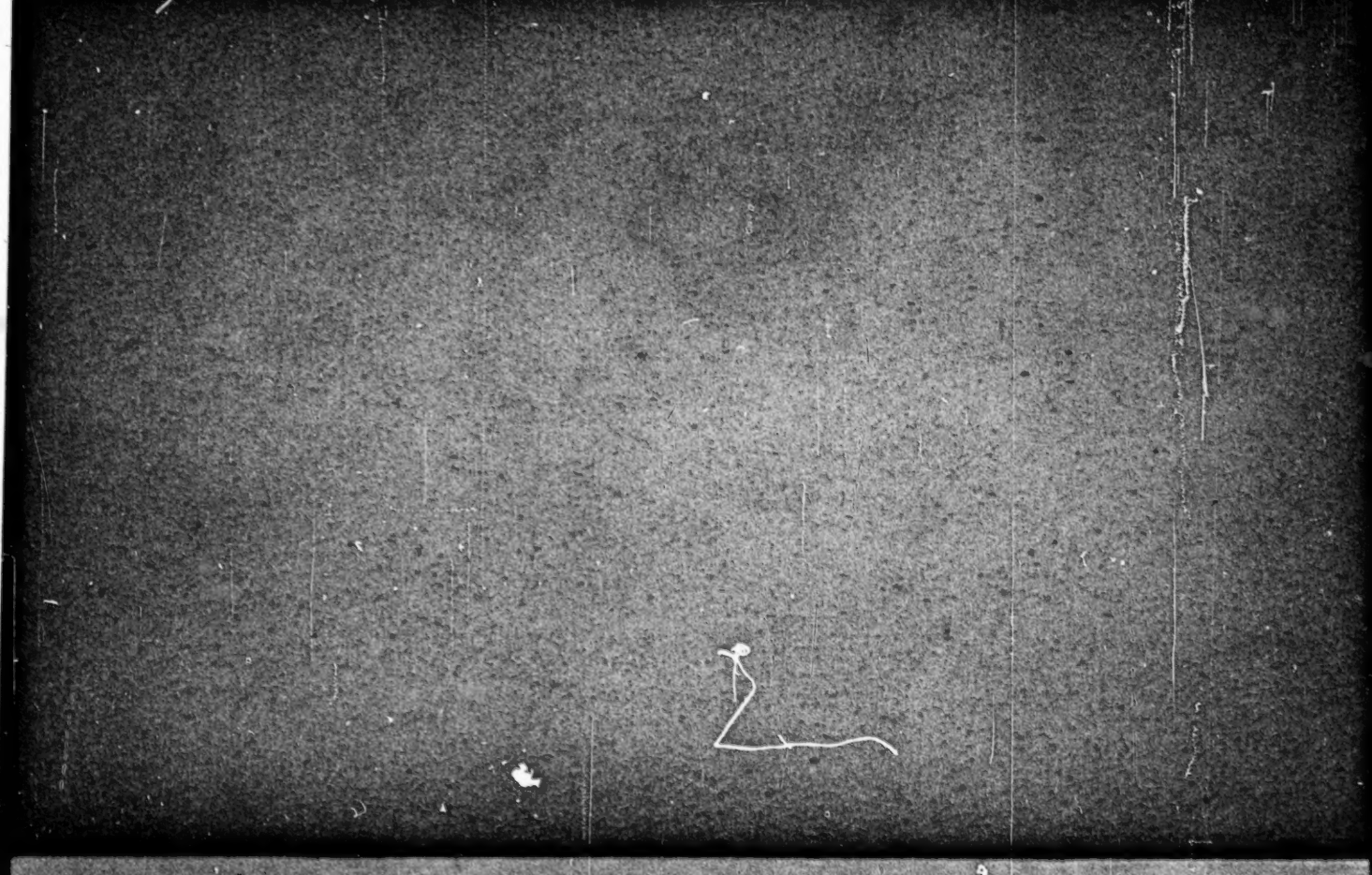

SUPREME COURT, U. S.

FILED

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1655

MYER AARON RUHM,
Petitioner,

vs.

BOB TURNER, Sheriff,
Oklahoma County, Oklahoma,

and

Hon. HEZ J. BUSSEY, Judge,
Hon. TOM BRETT, Judge,
and
Hon. ROBERT D. SIMMS, formerly Judge,
Court of Criminal Appeals, State of Oklahoma,
Respondents.

REPLY TO BRIEF OPPOSING CERTIORARI

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Attorney for Petitioner

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Comes now Petitioner, MYER AARON RUHM, and for his Reply to the Respondents' Brief Opposing Certiorari, would respectfully submit the following considerations:

First of all, the Petitioner would dispute the State's factual "Reasons for not Granting the Writ," as advanced on pages 2 and 4 of the Respondents' said Brief to the effect that the Petitioner is not attacking "the incidents of custody, but the very fact of custody itself." Nothing could be further from the truth; for indeed, as the Respondents themselves dwell upon at length, the Petitioner is *not* in physical custody; so clearly, by the Respondents' own contentions, the "very fact of custody" is obviously *not* being challenged.

Rather, as set forth in the original Complaint before the District Court, and as alluded to at pp. 5-6, 10, 19 of the Petition herein, the Petitioner was not so much seeking a formal writ of habeas corpus as he was seeking, e.g., a restoration of his voting rights (on Nineteenth Amendment grounds), and the lifting of his sexually-

grounded exclusion from 30-some-odd occupations, pursuant to Title VII of the Civil Rights Act of 1964,[1] prayers which clearly are more "civil rights" than "habeas corpus" in nature. Even that portion of his Complaint that attacked his conviction directly was as much for a *declaratory judgment* of the invalidity thereof, 28 U.S.C. 2201 et seq, coupled with the "civil-rights" remedy of the expungement of the records thereof.

At any rate, the District Court, without substantial objection, *did* entertain the action as "civil rights," *Ruhm* v. *Turner, et al.*, (W.D.Okla., 1973) 357 F.Supp. 324, fn. 1 at 325; and during the course of that action had

[1]Since a marijuana-possessing boy of 17 was an "adult felon" in Oklahoma at the time of Petitioner's conviction therefor in 1970 by virtue of 63 O.S. 1961, 451-452, and 10 O.S. 1970 Supp., 1101(a), whereas a similarly-offending like-aged girl was only a "juvenile deliquent," the boy, as the "felon," lost his franchise, Okla.Const., Art. III, Sec. 1, whereas the "deliquent" girl did not, 10 O.S. 1971, 1127(b).

Likewise, the boy, branded a "felon" because of his sex, was (and still is) barred for life from the occupations (in Interstate Commerce) of medicine (59 O.S. 509(6)), dentistry (59 O.S. 328.32(a)), law (Bar Rule X(4)(b), 5 O.S. Ch. 1, App. 1), pharmacy (59 O.S. 353.26(c), psychology (59 O.S. 1370(a)(1)), physical therapy (59 O.S. 887.13(c)), social work (59 O.S. 1266(2)), chiropractry (59 O.S. 164d(b)), electrology (59 O.S. 805), cosmetology (59 O.S. 199.11(a)), undertaking (59 O.S. 396.12(a)), bartending (37 O.S. 527(a)(3)), realty (59 O.S. 850(o), shorthand reporting (20 O.S. 1502(d)(1), bonding (59 O.S. 1310(5)), accounting (59 O.S. 15.20(d)), engineering (59 O.S. 475.18(c)), architecture (59 O.S. 45.14(a), and surveying (59 O.S. 475.32), plus serving as a director of a bank (6 O.S. 1407) or other corporation (18 O.S. 1.40) or as an executor or administrator of an estate (58 O.S. 102(2)), as well as from certain areas of public employment, such as jury duty (38 O.S. 28(7)), elective office (26 O.S. 162) or other State employment (51 O.S. 24.1), or anything requiring the bearing of arms (21 O.S. 1283), including enlistment in the Armed Forces, see Army Regulation No. 601-210 — *all of which disqualifications in the area of employment the similarly [or even worse] offending girl does* **not** *suffer, by virtue of her mere "adjudication" of "deliquency,"* 10 O.S. 1127(b)!

specifically ruled that the Petitioner's (or Plaintiff's) apparent absence from custody was *not* a jurisdictional (or other) bar to adjudicating the merits of the action (as evidenced by the fact that the District Court decision, while adverse, was indeed squarely on the merits). See Appendix A hereto.

It is interesting to note that the State did *not* file a cross-appeal to the District Court's orders on the "civil rights" vs. "habeas corpus" and the "in custody" issues; which, Petitioner submits, raises a grave issue regarding the propriety of the Court of Appeals' unilateral and unsought decision to entertain the action *solely* as habeas corpus, thereby *changing* it from civil rights. Certainly the Petitioner feels it was unfair for the District Court, with full knowledge of the Petitioner's absence, first to assure the Petitioner that his presence was *not* necessary, and thus to promulgate an adverse decision on the merits - and then for the Court of Appeals to render the adverse decision on the merits unreviewable solely because of purely procedural difficulty that had openly existed from the inception of this litigation, and which, as stated, Petitioner had been assured would *not* constitute a jurisdictional defect. In other words, if Petitioner's apparent absence was a bar to the consideration of his Complaint on the merits, the fact should have been proclaimed at the outset, before an adverse adjudication on the merits had been entered - and not

sprung against him by surprise for the first time on appeal, so as to render the adverse decision on the merits procedurally unreviewable.

The Petitioner has already submitted his contention that *Preiser* v. *Rodriquez* (1973) 411 U.S. 475, is directed against the use of 42 U.S.C. 1983 as an evasion of the *exhaustion* prerequisites of habeas corpus, 28 U.S.C. 2254(b) - a point not involved in this case since there *was* exhaustion of State remedies, *Ruhm* v. *State* (Okla.Cr., 1972) 496 P.2d 809. See Petition herein, pp. 5-6, 19. Moreover, the traditional "custody" requirement of habeas corpus is simply no longer extant, *Hensley* v. *Municipal Court* (1973) 411 U.S. 345, and similar cases.

Since the exhaustion requirement *has* been met in this case, the rule of *Preiser* v. *Rodriquez*, supra, should not constitute a bar to proceeding under 42 U.S.C. 1983 and 28 U.S.C. 2201, if that would otherwise be the more appropriate course: which it obviously is, since the object of the declaratory judgment procedure is, inter alia, to insure against *prospective* harm to commence *in futuro* (e.g., the incarceration threatened herein), whereas habeas corpus traditionally is a procedure to relieve *accomplished* incarceration and which requires, in the Respondent's viewpoint, though contrary to all logic and justice, the suffering of the very punishment being challenged as a procedural prerequisite to the challenging

of that punishment! Thus, the State's urging of habeas corpus as the sole mechanism for challenging a conviction is akin to the ancient prosecutorial resistance to the civil rights declaratory judgment procedure of challenging an unconstitutional statute (as opposed to first violating the law, and then raising the unconstitutionality thereof as a defense to a subsequent criminal prosecution therefor).

Somewhere in our Anglo-American system of justice there surely must be a principle that a person capable of posting bond should not have to spend even one day in prison, until found guilty of some offense and the conviction therefor is *finally* adjudicated as constitutionally valid by a court possessed of competent appellate and/or collateral jurisdiction; and while this principle may be subject to some degree of qualification when the appellate or collateral attack is deemed to be frivolous, that sole exception to the basic principle of no punishment before a valid *final* conviction obviously does not apply in this case, when the Court of Appeals itself, in the recent case(s) of *Terry Lee Radcliff* v. *Anderson, Warden*, and *Grider, Warden* v. *William Lynn Stringfield*, 10th Cir., Nos. 73-1520 and 73-1550 (consolidated), June 14, 1974, has held its previous decision of *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18, fully retroactive, accord, *Woodall* v. *Pettibone* (4th Cir., 1972) 465 F.2d 49, cert. den. 413 U.S. 992, and thereby rendered this

Petitioner's similar conviction not only 'merely' erroneous, but an absolute *jurisdictional nullity.*[2]

Finally, and to whatever extent the Petitioner's absence may be deemed to be of any procedural relevance, Petitioner would submit that the State is *in pari delicto* therein by virtue of the fact that the Petitioner's bond was revoked by the State court as a retaliation to his previous attorney's threat to take the sexual discrimination herein to a *Federal* Court! See Appendix B hereto - an action which has been severely censured even within Oklahoma, see Appendix C hereto. And, lest there be any doubt as to the true nature of the State court's reaction to the youths who won *Lamb* v. *Brown* (10th Cir., 1972) 456 F.2d 18, supra, attention is invited to the outraged tone of such decisions as *Schaffer* v. *Green* (Okla.Cr., 1972) 496 P.2d 375.

[2]For more details, see Petitioner's "Motion to Vacate and Remand" herein. Stated simply, the combined effect of *Lamb* v. *Brown* and *Radcliff and Stringfield* is to have retroactively raised the male age of juvenility in Oklahoma from 16 to 18 (as it has been for girls). Thus, this male Petitioner's "adult" conviction, imposed at age 17, is a *jurisdictional* nullity under Oklahoma law, such that:

> "It is attended by none of the consequences of a valid adjudication... It can neither affect, impair, nor create rights. As to the person against whom it professes to be rendered, it binds him in no degree whatever ... It is not necessary to take any steps to have it reversed, vacated, or set aside, and whenever it is brought up against the party he may assail its pretensions and show its worthlessness. It is supported by no presumptions, and may be impeached in any action, direct or collateral. It is a judgment which is entirely void, and may be shown to be void in a collateral as well as a direct proceeding..."

Ex Parte Parnell (1921) 19 Okla.Cr. 273, 200 Pac. 456, 459-460, and many similar Oklahoma juvenile/criminal cases.

Thus, if this disturbed, teenaged boy be absent from Oklahoma, that absence was more than provoked by the State itself by an action which was unabashedly inflicted as nothing other than an outright penalization for his "daring" to assert the right to seek redress in a Federal forum, and wherefor the success of such provoked absence should not be deemed a proper basis for the denial of relief, if otherwise merited, by the Federal courts.

Respectfully submitted,

FREDERICK P. GILBERT
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Tulsa, Oklahoma 74103

Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MYER AARON RUHM,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	Case No. 72-420 Civil
	)	
BOB TURNER, Sheriff, Oklahoma County, Oklahoma,	)	
	)	
Defendant.	)	

ORDER

The Defendant's Motion To Dismiss based on his assertion that the Plaintiff is not "in custody" is overruled.

The Complaint appears to contain a civil rights action. Custody is not an essential to this type of action. Defendant will answer the Complaint within ten (10) days from the date hereof.

It is so ordered this 21 day of August, 1972.

/s/ Fred Daugherty
Fred Daugherty
United States District Judge

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

No. A-16,390

MYER AARON RUHM,
Plaintiff in Error,

vs.

THE STATE OF OKLAHOMA,
Defendant in Error.

ORDER DENYING BOND

WHEREAS, it is anticipated that an appeal to Federal District Court or the United States Supreme Court may be forthcoming in the above-styled and numbered cause on a jurisdictional question;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that bond, pending any further proceedings in any Court, be, and the same is, hereby DENIED.

WITNESS MY HAND AND SEAL OF THIS COURT this 1st day of May, 1972.

/s/ Hez J. Bussey
Presiding Judge

/s/ Robert D. Simms
Judge

APPENDIX C

[Volume 44, Oklahoma Bar Journal, Page 1879
Issue No. 22, June 2, 1973]

President Pro Tempore, James E. Hamilton, of the Oklahoma State Senate, has requested the publication in The Journal of the following Senate Resolution which passed the Senate:

Resolution

ENROLLED SENATE
RESOLUTION NO. 68

BY: STIPE

A RESOLUTION EXPRESSING THE SENSE OF THE SENATE THAT THE COURT OF CRIMINAL APPEALS' RULE 1.17B IS NOT IN KEEPING WITH THE CONSTITUTIONALLY ASSURED RIGHT TO BAIL.

WHEREAS, the right to bail, except for certain offenses, is assured by Article II, Section 8 and 9 of the Oklahoma Constitution, and by Amendment VIII of the United States Constitution; and

WHEREAS, Rule 1.17B of the Rules of the Court of Criminal Appeals is of provision that when said court has denied a petition for rehearing and, within five days, the mandate has issued "The mandate shall not be recalled, nor stayed, pending an appeal to any other court, nor shall bail be allowed by this court pending an appeal from a final decision of this court."

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE OF THE 1ST SESSION OF THE 34TH OKLAHOMA LEGISLATURE:

THAT it is the sense of the Senate that said provision precluding allowance of bail, above quoted, is not in keeping with rights protected by the United States and Oklahoma Constitutions.

Adopted by the Senate the 17th day of May, 1973.

/s/ LEON FIELD
Acting President of the Senate